Supreme Court, U.S.
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Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

-and-

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

LOWELL E. SACHNOFF
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
JOYCE A. POLLACK
ROBINSON CURLEY
& CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Attorneys for Respondents

172667

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

4819

QUESTIONS PRESENTED

1. Whether to use ambiguous legislative history to restrict the permanent injunction remedy provided by § 1964(a) of RICO to only the government, where the plain language of the statute does not limit the RICO plaintiffs who may use § 1964(a).

2. Whether to overturn decades of Hobbs Act precedent and to restrict the Act to only those cases where the property can be tangibly "received," and to do so in a case where (a) Petitioners *did* seek to obtain control over Respondents' property, namely, their right to make business decisions free of wrongful force, and (b) even if the Hobbs Act findings were in error, the error would be harmless based on scores of other predicate crimes.

3. Whether giving a unified jury instruction incorporating all the requisite elements of the extortion laws of each pertinent state, and to which Petitioners failed to make any specific objection at trial, was reversible error, where there are two other categories of predicate crimes that are unchallenged and alone are sufficient to support Petitioners' liability.

4. Whether the jury instructions as applied to the facts of this case violated the dictates of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), where those instructions and the Verdict Form (1) prohibited the jury from finding Petitioners liable unless Petitioners (a) knew about their enterprise's predicate crimes under RICO, and (b) held a specific intent to further those crimes; (2) required that the enterprise authorize or ratify the predicate crimes; and (3) required that any damages assessed by the jury result proximately from those predicate crimes; and where both the trial court, under Rule 52(a), Fed. R. Civ. P., and the Seventh Circuit, after its own plenary review, found *Claiborne*'s exacting standards had been satisfied.

RULE 29.6 STATEMENT

Respondents National Organization for Women, Inc.; National Women's Health Organization of Summit, Inc. d/b/a Summit National Women's Health Organization; and National Women's Health Organization of Delaware, Inc. d/b/a Delaware Women's Health Organization do not have any parent corporations and do not issue stock to the public.

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ABBREVIATIONS KEY

Pet. App. – Appendix of Petitioner Operation Rescue

PX – Respondents' Exhibits at Trial (Plaintiffs' Exhibits)

RA – Respondents' Appendix in the Seventh Circuit (Appendix to Plaintiffs-Appellees' Brief)

R – Record in the Seventh Circuit

T – Trial Transcript in the District Court

STATEMENT

The trial court found and the Seventh Circuit affirmed that Petitioners were all "high-level leaders" and organizers of the RICO enterprise, Pro-Life Action Network ("PLAN"),[1] Pet. App. 23a; and each personally coordinated and participated in PLAN's crimes. Their objective was "to overwhelm the law enforcement system and gain free access to the clinics without legal consequences" and put the clinics out of business through a pattern of crimes involving the wrongful use of force, violence and fear. Pet. App. 3a, 23a, 238a-39a; T3938.

Petitioners are not the non-violent "political protestors" of their petitions. They vowed to stop abortions "in every way possible," RA181, and their hallmarks were "blitzes" and the "year of pain and fear." T4006-07; Pet. App. 240a-41a, 265a. They declared, "You can try for 50 years to [stop abortion] the nice, polite way . . . or you can do it next week the *nasty* way."[2] RA187. In contrast to non-violent abortion opponents, like the National Right-to-Life Committee, which they belittled as "wimps," "closet activists" and "lily-pads for life," *e.g.* T1511-12, 3936, 4144; PX801 at 13, Petitioners were responsible for 121 predicate crimes against the Respondent women's health centers and their patients. The trial court found there was "more than adequate evidence" that Petitioners' violence would continue even after passage of the Freedom of Access to Clinic Entrances Act ("FACE"), unless an injunction was issued to restrain it. Pet. App. 260a-67a.

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1. The enterprise, PLAN, shared headquarters with Petitioner Pro-Life Action League, Inc. ("PLAL"). RA224. All three individual Petitioners were directors of PLAL and leaders of PLAN. Petitioner Scheidler was PLAN's Regional Director. These Petitioners are jointly referred to as "Scheidler" herein. One former defendant, Randall Terry, settled with Respondents before trial, agreeing to a more stringent form of injunctive-style relief than the injunction entered here. R1046-47. Petitioner Operation Rescue ("OR") was established by PLAN and was originally led by Terry. Pet. App. 3a, 23a; T4085-86.

2. Emphasis in quoted material has been supplied.

The evidence proved Petitioners organized and executed scores of clinic invasions and blockades involving assaults on doctors and patients to compel the clinics to cease providing lawful medical services and to deter their patients from doing business with the clinics. Not all the women victimized by PLAN sought abortions; they sought a wide variety of medical products and services, including contraceptives, cancer screening, post-operative gynecological care, fertility treatment and annual physicals. Pet. App. 235a-37a; T1387,1515-26, 1535, 1913-15, 4148-49. Petitioners, and the PLAN members they trained and directed, carried out assaults across the country to force clinics to close and patients to give up favorite doctors out of fear of PLAN's violence. T1912-18.

As examples, in Los Angeles, Petitioners and fellow PLAN members beat a post-operative ovarian surgery patient over the head with their anti-abortion sign, knocking her unconscious and causing her to bleed from the sutures in her abdomen. T1519-24. In Cherry Hill, New Jersey, they grabbed a clinic administrator by her hair and threw her to the sidewalk. T4814-31. In Atlanta, they seized a clinic administrator by the throat, choking and bruising her. T1551-52. In Milwaukee, they pulled a doctor by her leg to prevent her from entering the clinic and shoved her against her car. T1705-06. In Chico, California, they smashed clinic staff members against the clinic for hours, bruising them and damaging the glass door. T1441-46. In Pensacola, they assaulted a clinic staff member and volunteer by slamming them against the stairs, sending them to the hospital and leaving one with permanent injuries; meanwhile, they "trashed" the clinic, destroying medications and equipment. T1150, 1470-73, 4013-26; RA183, 184. They vandalized Respondent Delaware Women's Health Organization ("DWHO"), T662-63, and later came back to "case the place" and threaten the administrator with reprisals if she didn't leave her job. T1153-58. In Wichita, after forcing the clinics closed for weeks by massive "human chains," when federal marshals arrived to help patients enter the clinic, they grabbed and bruised the women as they passed through the corridor the marshals

opened. T766-77. Throughout the country, they rocked and beat on patients' cars, T771, 1520-22, 1914; they stalked doctors, clinic administrators and their family members, and laid siege to their vehicles and homes. T1707-09, 1715, 4120-22; they assaulted police officers who tried to protect the clinics, T1596-97; they dismantled surgical equipment, and contaminated surgical instruments and medications, T1150; they conducted "lock-and-blocks," utilizing Kryptonite locks, leg shackles, chains, cement blocks, "junker" cars and other devices to make clinics inaccessible. T1189, 1209, 1707, 2315-32, 2335, 3657-61. They used whatever force was necessary to keep clinics closed and to make patients give up and turn away. Throughout their 14-year siege of clinics across the country, they "cased" clinics to "let them know that they [were] vulnerable." T3930, 4036; PX640. They also repeatedly threatened Respondents that if they did not surrender their rights to do business with one another, they risked being targeted for PLAN's "blitzkrieg tactics." *E.g.*, Pet. App. 265a; RA196-206; T4008.

There was no infringement on protected advocacy or association; the jury entered unanimous verdicts against Petitioners only after being charged with *Claiborne*-based instructions, many drafted by Petitioners themselves. Special interrogatories required the jury to specify whether each Petitioner operated or managed PLAN, with knowledge of PLAN's crimes, with specific intent, through a pattern of predicate crimes, each involving the unlawful use of fear, force or violence. RA62-76. Each Petitioner was responsible for the crimes presented to the jury. In addition to being high-level leaders who organized PLAN's crimes, Petitioners personally trained and directed PLAN's members and volunteers, and carried out crimes personally.

For example, Scheidler organized and participated in the Pensacola clinic invasion, where PLAN leaders agreed who would invade through which door, who would destroy equipment and who would leave before the police came to avoid arrest while others laid siege to the clinic. T4013-26. After two

clinic workers had been sent to the hospital and two PLAN leaders had been jailed, Scheidler and PLAL bragged about how they "had a glorious time in Pensacola, Florida, last week. Shut down an abortuary for a couple of days by dismantling the suction machine." PX670. Giving special praise to Joan Andrews, a long-time PLAN member, T4024, who went to jail for the attack, Scheidler and PLAL announced, "Joan Andrews was superb and really put the old aborters out of business for a spell." PX674. All the individual Petitioners served as blockade "marshals," using bullhorns and other means to direct PLAN members what to do, often physically barring the doors themselves. T772, 1382, 1698-99, 2369, 4095-97, 4101, 4111. Murphy was a primary leader of PLAN's lock-and-blocks, teaching PLAN members how to physically prevent clinics from opening; he carried out the lock-and-blocks with Scheidler's and Scholberg's express endorsement. T2311-20, 4101; Pet. App. 23a. Scheidler was part of the group that invaded the DWHO clinic, threatened the administrator and "cased the place." T1153. They sent threatening letters on their own letterhead, and personally signed them. Pet. App. 23a. Each Petitioner was active on PLAN's Leadership Council, which determined PLAN's illegal tactics. The Seventh Circuit found that "[p]laintiffs presented more than enough evidence to convince us that the individual [Petitioners] actively intended to further PLAN's illegal goals." Pet. App. 23a.

Petitioners claimed they were "non-violent," but they used the term "non-violent" to include "entering the [clinic], sitting in, blocking the entrance or blocking passages leading to the [operating rooms]." T4010. In Petitioners' vocabulary, "non-violence" even included arson and bombing: bombings are "in no way terroristic," T3953-54; "I find [the clinic bombings] no burden at all," RA212; and "I hardly think [bombing] is violence, since it is against bricks and glass. . . ." RA185; T3953-54. They repeatedly declared, "I believe in the use of force." T1910. The trial judge recognized Petitioners

consciously used words with double meanings to create fear, especially in the context of bombings.[3] T4531-32.

In 1987, Petitioners renamed their invasions and blockades "rescues," T4042-43, but they defined rescue as: "Making [a clinic] inaccessible . . . by placing our bodies around it, in it, somewhere on the premises so that [women] cannot get in . . . or it could include . . . our bodies and our cars, our bodies and Kryptonite locks, [or] our bodies and chains." RA169. No mere "interference" sufficed; the wrongful use of fear, force or violence was required for liability. RA69-70, 72.

PLAN united some 300 self-described "radical" anti-abortion groups. RA210; PX208, 646. At PLAN meetings, Petitioners taught tactics like the lock-and-block. Pet. App. 238a-40a; RA138, 187, 196. According to the jury instructions, had Petitioners operated independently rather than through PLAN, they would not have formed an enterprise cognizable by RICO. Had PLAN not resorted to unlawful force, Petitioners would not have been liable for predicate crimes.

The two Respondent clinics incurred extraordinary expenses to repair the damage and protect their patients, staff and property, *e.g.*, T2007, 2019. They sought and were awarded $85,926.92, the cost of repairs and expenses proximately caused by Petitioners' predicate acts, which was trebled under § 1964(c).

The unanimous jury verdict specifically found 21 Hobbs Act extortion-based crimes, 25 state extortion crimes and 25 attempts to violate either the Hobbs Act or state extortion laws. It also found 23 Travel Act crimes, plus 23 attempts to violate that Act, and 4 violations of the Hobbs Act through acts or threats of physical violence, none of which are challenged here.[4]

3. The trial court excluded all evidence that was not closely tied to Petitioners. On that basis, Respondents were not allowed to show Petitioners' links to arson and murder. T10-90 (02/27/98).

4. Scheidler acknowledges these RICO predicate acts (at 5 n.3), but OR errs (Pet. 4 n.5) in ignoring the "physical violence" crimes. *See* Pet. App. 311a-12a (Question 4(e)); RA67. Both Petitioners unsuccessfully challenged these findings in the court below, but neither challenges them here.

ARGUMENT

Petitioners come to this Court (1) having been found by a unanimous jury to have committed 121 predicate crimes under RICO (only 71 of which are challenged here), (2) having been adjudicated racketeers by the trial judge, (3) having lost their numerous post-trial motions,[5] (4) having lost their appeals in every regard in the Seventh Circuit, and (5) having had their petition for rehearing *en banc* denied by the Seventh Circuit without dissent. Petitioners postulate circuit splits involving RICO, the Hobbs Act, state extortion laws, and the First Amendment, but there are no true splits in the circuits and none that warrants this Court's attention. At most, there is some lower court *dicta* that differs from the Seventh Circuit's holding. Moreover, the extortion-related issues Petitioners pose are not material to the correctness of the liability determinations, and the practical import of these issues is diminished by recent federal legislation. None of the issues Petitioners raise is likely to recur.

The only disagreement Petitioners offer on the RICO injunction issue is between 16-year-old *dicta* of the Ninth Circuit and the recent Seventh Circuit holding. As for the Hobbs Act issue, for decades the courts have consistently held the Act protects intangible property, including the right to do business free of wrongful force. With regard to the unified state extortion instruction, the issue is not material to Petitioners' liability, no other circuit has ever reviewed such an instruction, and Petitioners waived this issue by failing to object at trial. Finally, Petitioners' First Amendment issues are fact-bound, and this Court's guidance is not required; moreover, the Seventh Circuit faithfully followed *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and independently reviewed the record, as required by *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485 (1984). None of these issues is sufficiently compelling to

5. OR implies their Rule 60(b) motions had merit, OR Pet. 7 n.10, but the motions were so baseless that they were either withdrawn by Petitioners or denied by the trial court and the denial affirmed on appeal. Pet. App. 37a-38a.

warrant the Court's attention. Indeed, this Court has denied *certiorari* on the RICO and Hobbs Act issues repeatedly. *E.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999), cert. denied, 528 U.S. 1075 (2000); *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000).

Significantly, Petitioners do not challenge the *scope* of the injunction, which does not restrict peaceful picketing, leafletting or speech, Pet. App. 271a-72a, nor do they challenge the predicate acts involving physical violence under the Hobbs Act, or the Travel Act violations. Likewise, they do not challenge the sufficiency of the evidence. Because the unchallenged predicate acts alone are sufficient to support liability, this case is an improper vehicle for review of Petitioners' extortion issues, as they would not change the outcome.

I. There Is No Need to Address the RICO Issue

A. No Circuit Split. Petitioner OR, at 12, correctly states "the decision below stands alone." Since RICO's enactment in 1970, only one circuit has had to decide whether private plaintiffs may seek permanent injunctions under RICO: the Seventh Circuit in *NOW v. Scheidler*. This unique case raises no issue in need of this Court's resolution. Only one other circuit – the Ninth – has had to decide the availability of injunctive relief of *any* type under RICO. *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). There, the Ninth Circuit tackled a far more difficult question: whether RICO allows *interim* injunctive relief. (As shown at 9-10 below, the text of § 1964(b) appears to limit *interim* injunctive remedies to the government, while the *permanent* injunction remedies available under § 1964(a) have no such limitation.) The Ninth Circuit's discussion was just *dicta* as to permanent injunctive relief because the issue before it was merely whether to affirm a preliminary injunction barring a spin-off church from disclosing Scientology materials. 796 F.2d at 1077, 1081 n.6. (Scheidler concedes, at 9, that *preliminary* relief is only a "related question" to the one on which they seek a writ.) Thus, there is no circuit split and certainly no split of any true importance.

Petitioners also overstate the "disarray" in the circuits. While a few have opined about whether such injunctions might be available in a proper case, this is not an issue that has troubled the circuits. Until *NOW*, all the discussions have been *dicta*.[6] The availability of private permanent injunctions has rarely been addressed, for a variety of reasons: (1) there were alternative bases for the relief;[7] (2) essential prerequisites were absent;[8] or (3) only *interim* relief was at issue.[9]

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6. Assuming availability: *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 (5th Cir. 2000); *United States v. Barber*, 476 F. Supp. 182, 189 (S.D. W. Va. 1979). Doubting availability: *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983). Noting it is an open question: *In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1223 (8th Cir. 1987); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 96 (6th Cir. 1982). (Petitioners' *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924 (6th Cir. 2000), was not a RICO case.)

7. *E.g.*, *Airlines*, 825 F.2d at 1223 (state law).

8. *E.g.*, *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Dist. 1990) (no likelihood of success on the merits); *Trane*, 718 F.2d at 28 (no irreparable harm); *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.) (no defendant enterprise distinction), cert. denied, 464 U.S. 1008 (1983); *Oregon Laborers*, 185 F.3d at 966 (no standing); *Dan River*, 701 F.2d at 290 (claim failed balance of hardships); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992) (no standing), cert. denied, 507 U.S. 1004 (1993); *Johnson v. Collins Entm't. Co.*, 199 F.3d 710, 727 (4th Cir. 1999) (court had to abstain); *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 93 (2d Cir. 1990) (no standing); *Ganey v. Raffone*, 91 F.3d 143, 1996 WL 382278 (6th Cir. July 5, 1996) (arbitrators did not enter injunction, therefore court lacked power to do so). Even Petitioners' state court case found the question premature. *Nakash v. Superior Court*, 241 Cal. Rptr. 578, 585 (Cal. Ct. App. 1987).

9. *Wollersheim*, 796 F.2d at 1079 (preliminary injunction); *Fredeman*, 843 F.2d at 828 (interim asset freeze); *Airlines*, 825 F.2d at 1221 (preliminary injunction); *Lincoln House*, 903 F.2d at 848 (interim asset freeze); *Trane*, 718 F.2d at 27 (preliminary injunction); *Dan River*, 701 F.2d at 280 (preliminary injunction).

Because the Seventh Circuit is the first circuit in RICO's 32-year history required to decide whether private plaintiffs may obtain permanent injunctions after judgment, the Court should await further deliberation below, if the issue ever again arises.[10] Since there is no conflict in need of resolution, it would be beneficial to allow the issue to percolate through the courts of appeal rather than reviewing the issue the first time it arises.

B. The Seventh Circuit's Textual Analysis Is Correct.

1. No Limitation on Parties Who May Use § 1964(a). RICO's § 1964(c) gives parties who are injured in their business or property the right to sue, and § 1964(a) gives district courts jurisdiction:

> to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including but not limited to: . . . imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in. . . .

There is no textual restriction on who may seek this relief.

As this Court explained in *California v. American Stores Co.*, 495 U.S. 271, 295 (1990), when a statute's text does not restrict the relief a party may seek, it is assumed Congress intended equitable provisions to govern. The Seventh Circuit properly applied that rule to the statute here. RICO's only source of *permanent* injunctions is § 1964(a), which unambiguously allows such relief. *See* Pet. App. 10a; *Wollersheim*, 796 F.2d at 1083. A plain, straightforward reading of § 1964(a) shows no restrictions on the parties who may use it. Pet. App. 9a. By contrast, § 1964(b)[11]

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10. Although Petitioners' violence continued after FACE was enacted, FACE makes RICO's future application in this context unlikely.

11. Section 1964(b) provides: "The Attorney General may institute proceedings under this section. . . . *Pending final determination* thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper."

applies only to *interim* relief sought by the government, as Scheidler concedes at 11. The Seventh Circuit explained that because RICO's § 1964(b) expressly grants the *government* the right to seek *interim* remedies, with no reference to private plaintiffs, one could conclude that interim remedies are available to only the government. Pet. App. 10a, *see also Dan River*, 701 F.2d at 290.[12]

Scheidler's brief to this Court in 1993 conceded that with regard to private plaintiffs injured in their business or property, permanent injunctions are proper: "RICO civil remedies are set out at 18 U.S.C. § 1964. *While they include injunctions*, RICO's most distinctive civil remedy is . . . treble damages. . . ."[13] Scheidler Rspt's Br. in *NOW v. Scheidler*, No. 92-780, 1993 WL 459767, at *17. Although Scheidler now tries to retract his admission that RICO's text allows private plaintiffs to seek permanent injunctions, the text of § 1964(a) is unrestricted and unambiguous. As in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985), this absence of restriction does not demonstrate ambiguity; it demonstrates breadth.

The reading of § 1964 that Petitioners now proffer is unreasonable because it fails to explain why the government – which, like private plaintiffs, is not mentioned in § 1964(a) – can use the permanent injunctive remedies of § 1964(a) while other RICO parties cannot. Pet. App. 10a, 12a. Petitioners' crabbed and illogical reading of § 1964 must be rejected.[14]

12. Also, as *Ashland Oil, Inc. v. Gleave*, 540 F. Supp. 81, 84 (W.D.N.Y. 1982), observed, § 1964(a) is limited to relief necessary "to prevent and restrain violations of Section 1961." Most forms of interim relief, like asset freezes, would not satisfy this requirement.

13. Defendants in other cases have agreed. *E.g.*, *Bolin*, 231 F.3d at 977 (defendant did not contest availability of permanent injunctive relief); *Rhode Island Laborers Health & Welfare Fund v. Philip Morris, Inc.*, 99 F. Supp. 2d 174, 180 (D.R.I. 2000) (same). Even in *Wollersheim*, both parties and the lower court *assumed* injunctions were available until the Ninth Circuit raised the issue on its own initiative. 796 F.2d at 1080.

14. This Court has repeatedly instructed that as "a cardinal principle of statutory construction" a statute ought to be construed so that "no (Cont'd)

2. Petitioners' Antitrust Analogy. Petitioners make much of the difference in structure between the antitrust and RICO statutes, stressing that antitrust remedies are spread over many sections while RICO's are collected in § 1964. This distinction is meaningless in understanding RICO's remedies.[15] As the Seventh Circuit explained, despite numerous differences in statutory language and structure, this Court regularly treats the antitrust and RICO remedies identically. Pet. App. 16a-17a. Despite their differences, the antitrust laws were a model for RICO, and when RICO was enacted, injunctions had long been available to private antitrust plaintiffs. 15 U.S.C. § 26.

3. Conflation of Rights of Action with Remedies. Petitioners also err by conflating the question whether injunctive relief is available to *a party who has express standing*, with the question whether there is an *implied right of action* for a party *without express standing*. Their authorities, *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); and *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974), all address *implied* rights of action for parties without standing. These cases are uninstructive on whether parties who *do* have express statutory standing may seek injunctions.

American Stores is more helpful here. Rejecting the Ninth Circuit's restrictive reading of antitrust remedies, the Court explained that because the text there did not restrict the relief a

(Cont'd)
clause, sentence or word shall be superfluous, void or insignificant." *Duncan v. Walker*, 533 U.S. 167 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). Petitioners' alternative interpretation of § 1964 also violates this principle because it would render the injunctive provision in § 1964(a) a nullity. Pet. App. 11a-12a.

15. OR (at 12) relies on *Minnesota v. Northern Securities Co.*, 194 U.S. 48 (1904), to argue that RICO's private remedies are like those in the antitrust laws. But that case discussed Sherman § 4, 15 U.S.C. § 4, which resembles RICO's § 1964(b), not § 1964(a).

party could seek, the full range of equitable remedies was available. 495 U.S. at 281. This rule has clear application to RICO, whose text expressly declares that *private* rights of action were included *to strengthen the means available for fighting crime*, and requires RICO be construed to "effectuate its *remedial* purposes." *Sedima*, 473 U.S. at 498. Those "'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* "[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Id.* at 491 n.10. *See also Rotella v. Wood*, 528 U.S. 549, 557-58 (2000), stressing plaintiffs' important private attorney general role. These principles reinforce the Seventh Circuit's straightforward reading of § 1964(a).

C. Legislative History. Statutory interpretation begins with the statute's text. *Duncan v. Walker*, 533 U.S. 167 (2001). When the textual command is clear, the task also ends there. *Alexander v. Sandoval*, 532 U.S. 275, 288, n.7 (2001); *Miller v. French*, 530 U.S. 327, 336 (2000). The Court has repeatedly stressed this rule of statutory construction with RICO, consistently rejecting interpretations that would limit its application in ways not reflected in its text.

Petitioners, unable to find their desired construction of § 1964 in RICO's text, invite the Court to embark upon a trek into "the thicket of legislative history." *United States v. Gonzales*, 520 U.S. 1, 4 (1997). Petitioners rely solely upon *Wollersheim*. But as the Seventh Circuit recognized, *Wollersheim* substitutes "legislative history" for plain text, an approach that fails to conform to this Court's jurisprudence. Pet. App. 7a-8a. Even though *Wollersheim* conceded that an interpretation of § 1964 akin to the Seventh Circuit's was a "plausible reading," it discarded this reading to heed the "mandate[]" of legislative history. *Wollersheim*, 796 F.2d at 1084.

But legislative history does not issue mandates; statutes do. Petitioners are wrong about the circumstances where legislative history properly guides statutory construction. It is a

default mechanism used only when the text has failed. It cannot be used to cloud a statute's otherwise clear text.[16] *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

Even if legislative history could defeat a commonsense reading of § 1964(a), Petitioners' use of RICO's history is unpersuasive. Their version of this history plucks a few kernels from an ambiguous record, construes congressional inaction as positive achievement, and treats post-*hoc* remarks as the equivalent of pre-enactment congressional deliberation, the same error made in *Wollersheim*. *See* Pet. App. 15a.

Legislative history is particularly unhelpful when it consists of "snippets" that might support either party's conclusion. *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 963 n.4 (1997). Here, Petitioners' sole authority acknowledged that it relied on only part of § 1964(a)'s legislative history. *Wollersheim*, 796 F.2d at 1085. In fact, RICO's legislative history has more support for the conclusion *opposite* to that which the *Wollersheim* panel reached. *See* Blakey and Cessar, *Equitable Relief Under RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White Collar Crime?*, 62 Notre Dame L. Rev. 526, 549-52 (1987). For example, the only separate vote taken on private injunctive relief *passed* the Senate unanimously but was never voted on by the House. Rep. Steiger withdrew his amendment, noting that the bill may have already contained such relief. *Equitable Relief* at 550 (*quoting* 116 Cong. Rec. 35, 347 (1970)). Senator McClellan, RICO's chief Senate sponsor, emphasized: "RICO is not limit[ed to] the remedies . . . already . . . established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice." *Id.* at 556 (*quoting* 115 Cong. Rec. 9567 (1969)).

When, in addition to the defect of selective reference, the legislative history consists only of legislative inaction – the failure to enact a bill – legislative history has even less value as

16. Of course, the fact that parties take differing views of a statute's language does not render it ambiguous. *Miller*, 530 U.S. at 336.

a tool of construction.[17] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"). Indeed, because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others," *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001), inferences drawn from a bill-that-never-was are "speculative." *Martin v. Hadix*, 527 U.S. 343, 357 (1999).

Even less reliable as a guide than pre-passage congressional inaction is legislative "history" that takes place *after* the statute's enactment, such as that offered by Petitioners here. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"). When post-enactment history consists only of inaction by Congress, as here, its relevance as an interpretive guide approaches zero. *United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring) ("Congress can no more express its will by not legislating than an individual member can express his will by not voting."). This Court should decline Petitioners' invitation to grasp the thin reed of legislative history they offer to challenge the Seventh Circuit's sensible textual analysis.

D. No Practical Need to Resolve this Issue. Even without the mandate of § 1964(a), the courts' inherent powers support injunctive relief due to the strong governmental interest in preventing future violations. Absent the clearest congressional command to the contrary, federal courts retain inherent power to grant injunctions. *Califano v. Yamasaki*, 442 U.S. 682, 705

17. Compounding the unreliability, Petitioners and *Wollersheim* incorrectly assumed that Congress *rejected* an amendment providing private injunctions; the amendment was never rejected but merely withdrawn without a vote being taken in the House.

(1979); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (where a party has the right to sue, federal courts "may use any available remedy to make good the wrong"). In RICO, there is no "clear congressional command" to deny injunctive remedy; to the contrary, private injunctions honor § 904(b), which declares RICO's textual remedies are *in addition to* remedies available under other sources of law. Pub. L. 91-452 § 904(b), 84 Stat. 947 (1970), and RICO's liberal-construction clause, which mandates effectuating RICO's *remedial* purposes. Pub. L. 91-452 § 904(a), 84 Stat. 923, 947 (1970).

The availability of injunctions under RICO is unlikely to arise with future abortion protests, for FACE provides broad relief and is simpler to navigate. Moreover, even Petitioners have now publicly disclaimed interest in using the tactics that led to the judgment below. It is also telling that, despite the arguments raised in various *amicus* briefs that Petitioners have lodged with the Court, the parade of horribles they predicted has not materialized. Perhaps the dearth of such cases is due to protestors' use of lawful speech rather than wrongful force and violence.[18] Even if there were a circuit split, which there is not, litigants like Petitioners who have been found liable for scores of egregious and violent acts, and who have no challenge to the sufficiency of the evidence against them, are poor candidates for the special solicitude of this Court's plenary review.

II. There Is No Hobbs Act Issue Requiring the Court's Review

A. Improper Vehicle. Even without the Hobbs Act violations that the jury found, four other categories of predicate crimes – including two categories that are unchallenged here – are independently sufficient to sustain liability. This case, therefore, is an inappropriate vehicle for determining whether the Seventh Circuit's construction of the Hobbs Act was correct.

18. One of Petitioners' would-be *amici* below stated there, "By 1991, *most* of these pro-life advocates turned to other entirely lawful means of preventing abortions. . . ." Brief of *Amicus Curiae* Life Legal Defense Foundation in Support of Appellants, at 1.

Furthermore, this case does not present the Hobbs Act issue Petitioners pose. Even if Petitioners were correct, that the Hobbs Act protects only those property rights capable of being received, both the facts and the jury instructions show that Petitioners *did* seek to "obtain" Respondents' property in the form of control over Respondents' business decisions. The jury was properly instructed that Hobbs Act violations could be predicated on only those property rights that Respondents were induced to surrender. The Hobbs Act instructions did not permit liability premised on mere coercion, as Petitioners suggest.

B. No Circuit Split. *1. Intangible Rights.* The jury found Petitioners responsible for 21 acts of Hobbs Act extortion, predicated on "knowingly, willfully, and wrongfully us[ing] actual or threatened force, violence or fear to cause women, clinic doctors, nurses or other staff, or the clinics themselves *to give up a property right*." RA307-08.

Since *Carpenter v. United States*, 484 U.S. 19 (1987), it has been settled that property includes *intangible* property rights. *United States v. Green*, 350 U.S. 415, 420 (1956), made clear nearly 50 years ago that Hobbs Act extortion "in no way depends upon having a direct benefit conferred on the person who obtains the property." Unsurprisingly, every circuit to confront the issue has agreed that Hobbs Act extortion does *not* require property that can be physically "delivered"; those who obtain control over intangible property rights "obtain property" within the meaning of the Act, *e.g.*, *United States v. Santoni*, 585 F.2d 667, 672-73 (4th Cir. 1978) (compelling victim to enter into business contract), cert. denied, 440 U.S. 910 (1979); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977) (rejecting argument that "obtaining" means "reducing to actual physical possession"), cert. denied, 435 U.S. 968 (1978); *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir.) (extortion applied to intangible property, including business accounts and unrealized profits), cert. denied, 411 U.S. 951 (1973); *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969) (forcing victim to give up right to solicit trash removal business satisfied

"obtaining property" requirement), cert. denied, 397 U.S. 1021 (1970); *see also United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) (defendant would violate Hobbs Act by demanding victim burn $1 million in cash), cert. denied, 479 U.S. 1095 (1987); *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir.) (no need that defendant "receive" anything), cert. denied, 516 U.S. 945 (1995). Indeed responding to the Court's question in this case in 1993, the Solicitor General's office explained, "[T]he right to control the disposition of your [property] is, in itself, a property right." *NOW v. Scheidler*, No. 92-780, 1993 WL 757635, at * 22-23.

Because the extortionist typically seeks to obtain the victim's *agreement* to surrender a property right against the victim's will (*i.e.*, with "consent"), some courts have viewed the victim's *agreement* to surrender control as the property the defendant "obtains." *E.g.*, *United States v. Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992) (defendant obtained victim's promise). *Lewis*, 797 F.2d at 364 n.3, explained that while "most extortionists undoubtedly seek a direct and tangible economic benefit from their demands," others "may be motivated only by a desire to humiliate the victim or a third party, and the discomfort they cause is the gain they derive from the scheme."

This approach is fully consistent with the jury's verdict here, that Petitioners' crimes were designed to make Respondents "give up" their property rights. Petitioners demanded the clinics "close or be closed"; if Respondents didn't agree to surrender their right to do business, PLAN would use blitzkrieg tactics to close them by force, *e.g.*, RA196-206; PX801 at 17; T4104-05, 4111. Thus, Petitioners sought to obtain the clinics' agreement (against their will) to close *e.g.*, T1877-78; RA196-206.

Because the property extorted here was the right to make business decisions free from outside pressure illegally imposed, when Petitioners exerted control over that property, they "obtained property" under the Act. Just as surely as an extortionist who uses unlawful threats to control a corporate

board's decisions about what business to pursue, Petitioners used wrongful force to direct Respondents' business decisions and in so doing, sought to "obtain property" from them. On similar facts, other circuits have reached the same conclusion: *Arena*, 180 F.3d at 394 (anti-abortion extremists extorted property rights from clinics, doctors and patients); *Libertad v. Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995) (it is "difficult to conceive a set of facts that more clearly sets forth extortion"); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (clinic's interest in providing services, and patients' interest in entering into a contractual relationship with clinic were property rights that were extorted). *Arena*, 180 F.3d at 394, explained that when the extorter attains "disposal of" property by "regulation of [its] fate," the extorter has "obtained" it, *citing* the definitions of "obtain" and "disposal" in THIRD NEW INTERNATIONAL DICTIONARY, 1559 (1976). *See also Tropiano*, 418 F.2d at 1076-77 (using force to make victim stay out of certain parts of trash removal business violates Hobbs Act).

2. Intangible Property Rights Versus "Ethereal" Rights. Nor is the Seventh Circuit's decision "difficult to reconcile" with *McNally v. United States*, 483 U.S. 350 (1987). *McNally* held that property under the mail fraud statute did not include the "right of the citizenry to good government." *Id.* at 356. But *Carpenter* made clear that *McNally* did *not* limit the meaning of property and affirmed that it includes *intangible* property rights as well as tangible ones. 484 U.S. at 25. Importantly, *Carpenter* distinguished the "ethereal" right to good government,[19] which is not "property," from the intangible property right to control business information, which is. *Id.* The right to do business

19. Unlike *McNally*, there is no risk here of involving the federal government in setting standards for local officials. *See, e.g., United States v. Debs*, 949 F.2d 199, 201-02 (6th Cir. 1991) (finding that *McNally*'s concern about setting standards for state and local officials had "no analogue in the union arena"), cert. denied, 504 U.S. 975 (1992).

free of unlawful outside pressure is an intangible property right fully protected under the Hobbs Act.[20]

3. No Split with the First or Second Circuit. Contrary to Petitioners' arguments, *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), does not dispute that the Hobbs Act protects Respondents' right to do business. *West Hartford* decided only that the *town* had no property right in overtime wages it paid its police to respond to defendants' violence. *Id.* at 102. Unlike private parties, the government is thought not to have property rights. *Cleveland v. United States*, 531 U.S. 12, 20 (2000),[21] *see also Equitable Relief* at 546. Furthermore, the more recent Second Circuit decision, *Arena* squarely held that the "obtaining of property" requirement was satisfied when defendants forced clinics and patients to surrender their right to do business with one another, 180 F.3d at 394.

Nor does *Libertad*, 53 F.3d at 436-37, suggest a circuit split. *Libertad* found the plaintiff *women's* claims failed because they had not shown that they suffered harm from Petitioners' conduct.[22] The court emphasized, however, that the women *would* have claims if they could prove injury to their business or property, "such as lost wages or travel expenses, actual physical harm, or specific property damages sustained as a result

20. Petitioner Scheidler (at 15) erroneously states that the Seventh Circuit defined property to include "liberty interests." It did not. The court said property includes the "intangible" right to conduct business, which even these Petitioners concede is property. Scheidler Pet. n.8.

21. Far from conflicting with the Seventh Circuit's holding, as Petitioners suggest, *Cleveland* supports it because *Cleveland* emphasizes how the property that is subject to extortion *must belong to the victim*. Because the video poker license at issue in *Cleveland* was not "property" in the hands of the governmental licensor, it could not support a mail fraud conviction. Here, unlike *Cleveland*, there is no question that the right to do business belonged to Respondents.

22. *Monterey Plaza Hotel Limited Partnership v. Local 483 of Hotel Employees*, 215 F.3d 923 (9th Cir. 2000), is similar. In this mail fraud case, the court held that the hotel's "goodwill" *could* indeed constitute property but found that defendants' deceptive acts did not cause loss.

of a RICO defendant's actions." The women here showed these types of harm in abundance. *E.g.*, T768-74, 1519-26, 1912-18.[23] As to the clinic's intangible right to freely conduct its lawful business, *Libertad* agreed it could sue anti-abortion extremists under RICO for Hobbs-based predicate acts, noting it would be "difficult to conceive a set of facts that more clearly sets forth extortion as it is defined by §1951(b)(2)." *Id.* at 438, n.6.

4. The Panaro Dicta. Confronted with decades of cases holding that "receipt" of the extorted property is not required, Petitioners conjure up a circuit "split" based on sheer *dicta* from *United States v. Panaro*, 266 F.3d 939 (9th Cir. 2001).[24] In its amended opinion, the *Panaro* panel gratuitously noted that defendants were trying to get the victim's business for themselves. Citing an inapposite 40-year-old robbery case,[25] *Panaro* appended the novel "receipt" requirement onto the long-accepted definition of Hobbs Act extortion, suggesting that someone "must receive the property of which the victim is deprived." *Id.* at 948.

The *Panaro* panel's gratuitous comment on which Petitioners' "split" depends is unpersuasive; it is mere *dicta* and had absolutely no impact on the court's holding. Because "receipt" of property was unnecessary to the court's decision, it has no precedential value even in its own circuit. *E.g., Best Life Assurance Co. of California v. Commissioner*, No. 00-71082,

23. Petitioner Scheidler concedes that the *clinics'* right to do business is a property right, while contending that a patient's right to seek medical products and services is not a property right. Because the judgment that provides the basis for the injunction and damages here would still stand even if the *patients'* property rights were not extorted, the issue has no practical importance.

24. Even Petitioners do not contend *Panaro held* receipt is required; they call it a "conclusion." Scheidler Pet. 16.

25. Cases construing the Hobbs Act's robbery prong are inapposite, for robbery covers only "*personal* property," 15 U.S.C. § 1951(b)(1).

2002 U.S. App. LEXIS 2190, at *5 (9th Cir. Feb. 11, 2002).[26] Furthermore, because Petitioners' extortion of Respondents' right to do business satisfied the "obtaining of property" requirement, even if *Panaro*'s *dicta* were correct, it would not change the outcome here.

C. *Enmons*. Petitioners contend that the Seventh Circuit's analysis is "in considerable tension" with *United States v. Enmons*, 410 U.S. 396 (1973). It is not. In the 29 years since *Enmons* was decided, courts have been careful not to extend its application outside the collective bargaining context. *E.g., Debs*, 949 F.2d at 200-01; *United States v. Zappola*, 677 F.2d 264, 269-70 (2d Cir.), cert. denied, 459 U.S. 866 (1982); *United States v. Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980). There are good reasons for the decision not to extend *Enmons*, for "there is a danger that *Enmons*, if read as the appellants read it, could effectively repeal the Hobbs Act." *Cerilli*, 603 F.2d at 419.

The violence in *Enmons* occurred during a legitimate union strike. Because the workers had a lawful claim to obtaining the property at issue – higher wages – the Court concluded that their strike was not "wrongful." 410 U.S. at 400. In contrast, the Petitioners here had no lawful claim to obtaining Respondents' property, namely their right to do business with one another. Thus, even if *Enmons* applied, Petitioners' attempt to obtain control over Respondents' right to do business would not fit the *Enmons* exception.

Petitioner Scheidler also erroneously contends that the property in *Enmons* included not just the higher wages but also

26. *Panaro* fails to discuss earlier Ninth Circuit cases that impose no "receipt" requirement. *E.g., United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985) ("right to make personal and business decisions [about life insurance] free of threats and coercion" was a property right that defendants made the victim give up), cert. denied, 475 U.S. 1024 (1986). *See also United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980) (intangible right to make business decisions free of wrongful coercion is property right under Hobbs Act), cert. denied, 450 U.S. 916 (1981).

the transformer the workers damaged during the strike. They argue that because the workers had no right to *that* property, *Enmons* should apply whenever defendants claim some general lawful purpose. Scheidler is wrong for two reasons. First, a careful reading of *Enmons* shows that the transformer was not the "property" to which the Court was referring. (Nor is the property here the medications and equipment Petitioners destroyed, but rather the Respondents' right to do business.)

Second, if *Enmons* meant what Petitioners suggest, every defendant charged with extortion would claim a "rightful" purpose, whether political, religious, environmental, moral or something else. The lower courts have rejected such an exception to the Hobbs Act, and nothing in the Act's text supports its creation. *E.g.*, *United States v. Anderson*, 716 F.2d 446, 447-48 (7th Cir. 1983) (upholding Hobbs Act conviction for threatening doctor to make him stop performing abortions); *United States v. Starks*, 515 F.2d 112, 124 (3d Cir. 1975) ("there is no exception to the Hobbs Act which permits extortion for . . . a [religious] purpose."); *United States v. Mitchell*, 463 F.2d 187, 193 (8th Cir. 1972) (rejecting argument that civil rights protest was not subject to Hobbs Act and quoting Congressman Hobbs, that "crime is crime, no matter who commits it"), cert. denied, 410 U.S. 969 (1973). Petitioners' argument merely repackages their unsuccessful "motive" defense to RICO, that having a political/religious "motive" while intentionally committing crimes is a defense. The Court unanimously rejected that argument with RICO. As Justice Souter, joined by Justice Kennedy, explained, "it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling." *NOW v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring). The "good motive" argument has no more viability under the Hobbs Act than it does under RICO. Furthermore, if there was ever any doubt that terrorists who commit crimes for political/religious reasons can be as dangerous as those who do so for financial profit, there can be none now.

D. Federalism. *United States v. Culbert*, 435 U.S. 371 (1978), rejected federalism concerns like those Petitioners raise, acknowledging that Congress *intended* the Hobbs Act to make extortion a federal crime, even though it was already a crime on the state level. *Id.* at 379. *See also United States v. Sturm*, 870 F.2d 769, 771-72 (1st Cir. 1989) (rejecting argument that application of Hobbs Act was a threat to state sovereignty or a waste of resources). The Court has long recognized that Congress intended the Hobbs Act to use all the constitutional power Congress had to prosecute anyone who interfered with interstate commerce, *Stirone v. United States*, 361 U.S. 212, 215 (1960), and to protect interstate commerce to the fullest extent possible. *Green*, 350 U.S. at 420-21.

III. There Is No Reason to Grant a Writ on the State Extortion Instruction

A. Improper Vehicle. Because Petitioners' liability could be sustained without Petitioners' predicate violations of state extortion laws, any error in the state law instruction is harmless, and this case is an improper vehicle for resolving the issue. The issue is doubly insignificant because Petitioners waived their objections, both at trial and on appeal. *See City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 259 (1987) (dismissing writ of *certiorari* as improvidently granted because petitioner failed to object to instruction at trial). Plenary review by this Court is also unnecessary because OR merely seeks review of a state law extortion instruction that incorporated *all* of the elements of several states' extortion laws in a single instruction. Because the Seventh Circuit declined to address the contention due to harmless error, there is no reason for the Court to consider it. This Court, as a court of review, not first view, *Adarand Constructors, Inc. v. Mineta*, 122 S. Ct. 511, 514 (2001), need not be the first to consider this issue.

Furthermore, OR does not contend – nor could it – that there is a circuit split on this issue, nor is there any overriding issue of federal law. OR cites no other case involving a unified instruction like the one used here, and the issue is unlikely to

recur. Indeed, this issue is so unworthy of review that Petitioner Scheidler elected not even to raise it.

B. Petitioners' Waiver. Because the trial court must be given the opportunity to correct any errors, a party may not claim error in an instruction unless that party objects, "*stating distinctly the matter objected to and the grounds of the objection*." Fed. R. Civ. P. 51. Objections must reveal "the *precise* nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943). Otherwise, objections are meaningless and error is waived. *Knox v. Indiana*, 93 F.3d 1327, 1333 (7th Cir. 1996).

Petitioners waived any challenge to the state extortion instruction by failing to object with even a modicum of specificity. Respondents' initial draft included separate instructions for each relevant state, which overlapped to a large degree. R1101. Petitioners made some objections, R1099, then the parties worked to simplify the instructions, as OR told the court. 02/20/98 T182. Respondents' revised draft presented a unified instruction incorporating each state's elements and met all of Petitioners' previous concerns. R1093. Petitioners never objected to the revised instruction with any specificity. OR simply asked, "[H]ow can one have a generic extortion charge?" T4355. When asked what was wrong with the instruction, OR relied on its earlier objection, which Respondents had satisfied.[27] T4355-58. By failing to identify any element it thought lacking, OR waived any argument it might have had.[28]

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27. Petitioners' objection to the earlier instructions was mooted by the revised instruction, *see Spanish Action Committee v. City of Chicago*, 766 F.2d 315, 319 (7th Cir. 1985).

28. OR waived any error again by failing to raise all its objections in its opening brief in the Seventh Circuit. OR discussed a few states, but Respondents' response showed the unified instruction met those standards. For example, although OR argued Wisconsin requires "pecuniary" intent, Respondents showed Wisconsin's law includes threats of injury to compel the victim "to do any act against the person's will." Wis. Stat. § 943.30(1). Indeed, *United States v. Nardello*, 393 (Cont'd)

C. The State Extortion Instruction Was Correct. Even if Petitioners had not waived their objections, the state extortion instruction was correct. Jury instructions are reviewed with great deference. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 342 (1988). They are examined as a whole, *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), in a common sense manner, avoiding fastidiousness, to see if the correct message was conveyed reasonably well. *United States v. O'Malley*, 796 F.2d 891, 897 (7th Cir. 1986). Here, because the pertinent states' extortion laws had so many common elements, separate instructions would have been duplicative and burdensome. One instruction incorporating *all* the elements of each pertinent state's law sensibly solved the problem.

State law extortion is a predicate act under § 1961(1)(A); it is also a basis for violating the Travel Act, 18 U.S.C. § 1952, which is itself a predicate act for RICO. (Petitioners have not challenged the verdict's Travel Act violations.) OR concedes extortion under both includes activity "within the generic term extortion." In *Nardello*, the Court rejected formalistic distinctions between extortion and coercion and made clear that "extortion" under the Travel Act is not limited by the labels states use, because that would "give the term 'extortion' an unnaturally narrow reading." 393 U.S. at 296. Instead, the Court explained, the Travel Act covers activity generally known as extortion. OR concedes this means "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." OR Pet. 24. That is exactly what the state law extortion instruction told the jury, except it required *even stricter findings* based on additional elements in certain

(Cont'd)

U.S. 286, 294 (1969), classified this very statute as extortion. On reply, for the first time, OR took issue with some *additional* states. Its failure to raise these challenges in its opening brief was a waiver under Seventh Circuit precedents, *e.g., Federal Trade Comm'n v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988). Those waiver rules should be respected. *See Beck v. Washington*, 369 U.S. 541, 550-53 (1962).

states (*e.g.*, value of property "must exceed $150" in Missouri). RA72.

IV. This Case Does Not Present the First Amendment Issues Petitioners Raise

A. No Unsettled Issue. Petitioners try to manufacture another circuit split where none exists, this time on First Amendment grounds. The principles governing vicarious liability and peaceful protest are settled, and Petitioners simply seek review of the application of those principles to the record here; this does not merit the Court's review. As for the alleged error, there is none: the courts below faithfully followed *Claiborne* and *Bose*.

Instruction 12 told the jury, "*Nor is peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing [and] leafletting are protected by the First Amendment.*" RA57. The Verdict Form ensured damages were based only on the predicate crimes. Question 9, RA3. Accidental violence was not actionable; the jury had to find PLAN's predicate crimes were committed "knowingly, willfully and wrongfully" with Petitioners' specific intent. Instruction 30, RA76.

There was no "guilt by association." The jury was told that "liability may not be imposed merely because the defendant belonged to a group, some members of which committed acts of violence." Instruction 30, RA76. "Mere advocacy of the use of force and violence may not be the basis for finding the defendants liable. . . ." Instruction 34, RA81. Petitioners could be held liable only if PLAN authorized or ratified the crime and *Petitioners themselves had the specific intent to further it*. Instruction 30, RA76. The jury, under these instructions, found Petitioners operated PLAN through a pattern of force and violence, knowingly, willfully and with specific intent that each crime be committed. There is no reason to review the application of these correct principles of law to the record of overwhelming evidence of Petitioners' liability.

B. The Vicarious Liability Instructions. OR argues that its liability was based on acts by "anyone participating in a pro-life demonstration." This is untrue, for several reasons. First, Instructions 20, 21, 24, 30 and 34, based on *Claiborne*, ensured this could not happen.[29] Petitioners themselves drafted Instruction 30, on vicarious liability, never objected to its final wording, T4922-23, and thus waived any objection, as the Seventh Circuit held. Pet. App. 25a-26a. By failing to object, Petitioners also waived the argument that more of the jury instructions should have been cross-referenced to the Verdict Form. *Id.*

Second, the trial judge reached the same conclusion as the jury, making findings under Rule 52(a); this was a second check that Petitioners' liability not based on "guilt by association." In fact, the trial court observed, "Plaintiffs have made a showing on which a reasonable juror could conclude that the [Petitioners] authorized all of the acts alleged in this case, including the acts of violence. . . . There is enough evidence to fill up this courtroom that the [violent] conduct was authorized [by Petitioners]." T4563-64.

Third, after making an independent review, the Seventh Circuit found *Claiborne*'s "exacting test" was satisfied. Pet. App. 23a. It concluded that the jury could not have found Petitioners liable "without finding that the Defendants themselves specifically intended to further PLAN's illegal aims," Pet. App.

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29. Instruction 20 required that Petitioners knew about the *illegal* acts. Instruction 21 required that Petitioners operated or managed the enterprise that used the illegal acts. Instruction 24 required the acts be committed knowingly, willfully and wrongfully. Instruction 30 declared that mere membership in a group whose members commit violence was not enough; PLAN itself had to authorize or ratify the act, and Petitioners themselves had to specifically intend them. Instruction 34 ensured that mere advocacy could not be the basis of liability. Petitioners argued these instructions to the jury extensively, stressing that to find liability, the jury had to find Petitioners had specific intent to further each unlawful act. T5045-73. That is what the jury found. *Miksis v. Howard*, 106 F.3d 754, 763 (7th Cir. 1997) (courts assume the jury follows its instructions).

26a, that "PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the Defendants were aware of PLAN's illegal aims" and had specific intent to further them. Pet. App. 23a.

C. Crimes, Not Peaceful Acts. OR says its crimes were "primarily" sit-ins and blockades and implies they were peaceful.[30] But Question 6 on the Verdict Form, which *Petitioners proposed and drafted*, and Instructions 24 and 26, ensured that any predicate acts involving sit-ins or blockades *also involved fear, violence or force*. Question 6 asked whether the predicate crimes involved sit-ins "without more," to which the jury answered, "no." That answer proves conclusively that the jury found *none* of the 121 predicate acts was a peaceful or non-violent sit-in, as Petitioners claim.[31] Also, PLAN committed predicate crimes other than sit-ins and blockades, for example, vandalism, stalking, assaults and threats of violence. *E.g.*, T662-63, 1157, 3930, 4036, 4120-22; RA196-206. Each predicate crime involved the wrongful use of force, violence or fear. In addition, the trial judge found that Petitioners' conduct underlying the RICO claim was unprotected because "[t]hese acts crossed the line of expression into the realm of threatening conduct."[32] Pet App. 264a.

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30. *Petitioners* offered proof that they also engaged in an occasional peaceful sit-in. Because peaceful sit-ins did not satisfy the requirements for predicate crimes in the jury instructions, Respondents did not argue that any of the peaceful sit-ins violated RICO.

31. OR insisted that Question 6 would ensure that the jury's findings of predicate acts would not be based on just the "sheer presence of people outside the clinic," but that any predicate act included criminal conduct illegal under RICO. T4485, 4568-69. It did.

32. Conduct that did not create "true threats" was excluded. *See* Instruction 25, RA71. Also, because the use of fear, force or violence had to be "wrongful," lawful pickets, hard bargaining tactics and other lawful exercises in persuasion cannot violate RICO. Many of the examples in the *amicus* briefs that Petitioners have lodged with the Court would not support liability.

Instructions 12 and 34 ensured Petitioners were not found liable for protected advocacy or speech, or for leafletting, picketing and other lawful conduct. The Verdict Form's Question 9 ensured damages flowed proximately from the predicate crimes and not from protected speech or other overt acts, thus satisfying *Beck v. Prupis*, 529 U.S. 494 (2000).

The Seventh Circuit too found that the "record is replete with evidence of instances in which [Petitioners'] conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts." Pet. App. 22a-23a.[33]

D. The Seventh Circuit's Plenary Review. Petitioners offer the radical proposal that the verdict of a properly-instructed jury can be set aside solely because a litigant would have liked a different verdict form. Not surprisingly, they offer no authority for this idea, which, the Seventh Circuit noted, could infringe the Seventh Amendment. Pet. App. 19a. Instead, Petitioners lift *dicta* from *Claiborne* (which reviewed a bench trial) to suggest highly-particularized "findings" *by juries* are required. Petitioners ignore Rule 49 Fed. R. Civ. P., which tells juries to issue general verdicts unless the trial court calls for a special verdict or interrogatories. Juries are not subject to Rule 52, which directs judges to "find the facts specifically." (This is a uniquely poor case to review the jury-trial standard since the trial judge, on the same evidence, *did* make particularized findings of Petitioner's crimes. Pet. App. 234a-42a, 263a-68a.)

Bose requires an "independent review" of First Amendment issues, but as *Harte-Hanks Communications, Inc. v.*

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33. Scheidler tries to raise another issue Petitioners waived by failure to raise it at trial: that the jury must agree on each predicate act. But the jury *was* told that unanimity was required for its findings. RA318. Furthermore, under RICO, even if Petitioners hadn't waived the issue, each predicate act is not a *separate* element; the predicate acts together are a *single* element. *Richardson v. United States*, 526 U.S. 813, 817 (1999), required unanimity only on each *element* of a crime.

Connaughton, 491 U.S. 657, 690-91 (1989), shows, this does not mean the jury must make "findings." In *Harte-Hanks*, the jury answered only *three* broad special interrogatories, in contrast to *four pages* of special interrogatories here. Further, *Harte-Hanks* showed that by reviewing the jury instructions, the verdict, any answers to special interrogatories and the record as a whole, the reviewing court performs the *Bose* analysis. *Id.* at 690. The Seventh Circuit made a painstaking, plenary review of the record. It found "ample evidence" that the jury's determinations were "fully supported by the record," and concluded that *Claiborne*'s "exacting test was satisfied." Pet. App. 20a-23a.[34] *Bose* requires nothing more.

CONCLUSION

The petitions for writs of *certiorari* should be denied.

Respectfully submitted,

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
JOYCE A. POLLACK
ROBINSON CURLEY
& CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

LOWELL E. SACHNOFF
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Attorneys for Respondents

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34. There is no "split" with *New York v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001). That court examined evidence underlying an injunction against 60 defendants and found that, with regard to *one*, it was inadequate. In contrast to that one, low-ranking defendant in *Operation Rescue National*, there was "more than enough evidence" here that all Petitioners here were high-ranking PLAN leaders who *directly* and *actively* organized, coordinated and participated in PLAN's predicate crimes with specific intent to further them. Pet. App. 23a.